U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

Public Copy

File: EAC 99 051 53564 Office: Vermont Service Center Date: FEB 14 2000

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER: [redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director of the Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner, a computer consulting firm, seeks to employ the beneficiary for three years as a programmer/analyst in the H-1B classification for specialty occupations. The director requested additional evidence on January 25, 1999 (I-797), and the petitioner responded with a brief and seven exhibits (I-797 response). In a decision issued April 19, 1999, the director determined that the job offered does not qualify as a specialty occupation. The petitioner appealed on May 21, 1999 and submitted a brief and additional evidence (appellate brief). The appeal maintained that the petitioner could provide the beneficiary with a *bona fide* offer of employment in the specialty occupation as a programmer/analyst.

Provisions of § 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(i)(b), accord nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. The definition in § 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), describes a "specialty occupation" as one which requires theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Regulations in 8 C.F.R. 214.2(h)(4)(ii) define the term specialty occupation as:

> an occupation which requires theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation in such fields of human endeavor, including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Provisions of 8 C.F.R. 214.2(h)(4)(iii)(B)*(1)-(3)* exact a labor condition application (LCA), which terms of § 214(c)(1) of the Act, 8 U.S.C. 1184(C)(1) mandate for a specialty occupation. The same statute exacts for each specific case the petition of an importing employer. Its particular position must meet one of the criteria of 8 C.F.R. 214.2(h)(4)(iii)(A):

> *1.* A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> *2.* The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
>
> *3.* The employer normally requires a degree or its equivalent for the position; or
>
> *4.* The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Other evidence which must accompany the petition includes a copy of the contract or a summary of the terms of the oral agreement of the petitioner and the beneficiary. 8 C.F.R. 214.2(h)(4)(iv)(B). They had none.

Instead, the appellate brief gave the background of the particular position's duties,

> In October of 1998, [a third party] requested that [the petitioner] apply for certification as an implementation partner. As a result, [the petitioner] entered into a contract to implement [the third party's] new human resources management software throughout the United States....
>
> As preferred vendor for [the third party], [the petitioner] was to implement [the third party's] new human resources management software for [the third party's] clientele, totaling over 11,000 companies [fourth party or end users]. As stated within the petition, the function of the programmer/analyst was to install, develop and test the [third party's] updated software system.

The appellate brief asserted without the benefit of any contract,

> The petition also specified that this position would also require the beneficiary to evaluate [end users] requests for modifications to the program and to determine compatibility with current systems and computer capabilities. Further, as specifically detailed in the petition, the beneficiary would also consult with [end

> users] to identify current operation procedures and clarify program objectives....

The appellate brief simply projected the beneficiary's duties,

> ... The programmer/analyst will consult with the [fourth parties] to identify the operating procedures for the current software system and to determine the specific needs of the [fourth party] in operating the human resource management software.
>
> After consulting with the [fourth party] regarding the system update, the programmer/analyst will prepare a detailed outline of the job requirements needed to implement the system update. This process is known within [the third party] as a "blueprint...."
>
> After approval of the "blueprint" by the [fourth party], the programmer/analyst will develop project specifications and interface with support personnel regarding project implementation. The programmer/analyst will enter program codes into the computer system and conduct tests.
>
> The programmer/analyst will also conduct and supervise the data migration from the previous software system into the updated software systems. This will require additional analysis and testing to ensure a complete transfer of the human resource data. The programmer/analyst may also provide technical assistance to the [fourth parties] in the operation of the updated software system.

No contract established the petitioner's status as a United States employer to hire, fire, supervise, evaluate, or otherwise control the beneficiary's employment and performance pursuant to 8 C.F.R. 214.2(h)(4)(ii). The petitioner recited duties which might qualify for a specialty occupation, but it tendered no particular position. 8 C.F.R. 214.2(h)(4)(iii)(A)*(1)-(4)*. The I-797 requested data on petitions and the current status of the various beneficiaries. Exhibits 5 and 6 of the I-797 response listed names, but they did not offer the beneficiary's itinerary or location during the three years of the validity of his petition. 8 C.F.R. 214.2(h)(2)(i)(B). Absent a position, the Department of Labor could not certify a LCA. See 8 C.F.R. 214.2(h)(4)(i)(B)*(2)*.

The reviewer could not ascertain the multiple locations at which the beneficiary would serve. The exhibits gave negative dollar amounts and unexplained entries for other employees, but none was demonstrably working in the Burlington, Vermont area, which the LCA in these proceedings referenced for 100 subjects. The LCA did not

support the petition. 8 C.F.R. 214.2(h)(1)(ii)(B)*(1)*. No entry, including exhibit 7 of the I-797 response, embodied a contract or agreement between any petitioner and beneficiary. 8 C.F.R. 214.2(h)(4)iv)(B). The director properly determined that no position qualified as a specialty occupation in which to ascertain the beneficiary's eligibility. 8 C.F.R. 214.2(h)(4)(i)(B)*(2)*.

Third and fourth parties, not the petitioner, wielded the power of employers in the positions which the beneficiary might occupy. As the importing employers, they must make the petitions, but did not. See § 214(c)(1) of the Act, 8 U.S.C. 1184(c)(1). In the case of multiple employers, each must petition for the beneficiary. None did in these proceedings. 8 C.F.R. 214.2(h)(2)(i)(C).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.